Filed 3/4/14 P. v. Brauford CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. VINCENT IRVIN BRAUFORD, Defendant and Appellant.	B246710 (Los Angeles County Super. Ct. No. YA079571)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Brendan Sullivan, Deputy Attorneys General, for Plaintiff and Respondent.

Vincent Irvin Brauford appeals the judgment entered following a jury trial in which he was found guilty of four counts of willfully committing a lewd or lascivious act upon a child under the age of 14 years, with true findings he committed the offenses in the present case against more than one victim. (Pen. Code, §§ 288, subd. (a), 667.61, subds. (b), (c) and (e)(5); counts 1-4.)[1]

At sentencing, the trial court imposed terms of 15 years to life consecutively for counts 1 and 3, making the total term in state prison 30 years to life. The 15-year-to-life terms for counts 2 and 4 were imposed concurrently.

CONTENTION

Brauford (appellant) proceeded in propria persona (in pro. per.) at trial. On appeal, he contends his pretrial May 14, 2011, *Faretta* waiver was not sufficiently informed, and thus his waiver of the right to counsel was not intelligent and voluntary. Accordingly, he is entitled to a reversal of the judgment. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).)

Essentially, he argues that pursuant to *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*) and the subsequent California Supreme Court decision in *People v. Johnson* (2012) 53 Cal.4th 519 (*Johnson*), implementing the *Edwards* decision in California, he was entitled to a fuller *Faretta* advisement and inquiry concerning self-representation. In his particular case, the inquiries in the standardized form and the trial court's inquiry concerning present and past mental infirmities were inadequate. He asserts that in the absence of a more elaborate *Faretta* advisement and inquiry, he was not properly advised so as to meet the constitutional requirements for a waiver of counsel, and he is entitled to a reversal of the instant judgment as a matter of due process.

He also seeks to have this court institute a new rule of criminal procedure requiring further inquiries and waivers as he specifies, and asserts he should receive the benefit of the application of any new such rule of criminal procedure.

---

[1] All further references are to the Penal Code unless otherwise indicated.

In this opinion, we decline his suggestion to imply from the decision in *Johnson* the requirements for a valid *Faretta* waiver have now changed, or to apply any new such rule of criminal procedure to appellant so as to reverse the judgment. Nor does the court find in appellant's particular case, his waiver of counsel was invalid.

BACKGROUND

1. *The trial evidence.*

The facts adduced at trial are not at issue in this appeal. Thus, the trial evidence will be stated briefly.

Appellant, age 29 at the time of trial, was S.B.'s boyfriend and lived with her in Gardena during the years 1999 to 2003. He was then 19 to 23 years old. At that time, S.B. had a female daughter T., age 7 to 8, as well as a son. Frequently, S.B.'s niece, N., who was a year younger than T., was at S.B.'s residence. Appellant moved out in 2003, and he and S.B. met only occasionally thereafter.

When T. was age 15, she told S.B. that when appellant lived with them, he had fondled her on two separate occasions, rubbing her vagina over her pants. Also, when they were alone, he had undressed her for no apparent reason. N. revealed to her mother, S.B.'s sister, that when appellant lived with S.B., appellant had digitally penetrated her vagina on two separate occasions. In late 2010, charges were filed. At trial, the victims were respectively 17 and 16 years of age.

In defense, appellant produced two women from his neighborhood who were prepubescent when he was an older teenager. They testified that he never showed any sexual interest in them. Appellant testified and denied the charges, claiming the accusations arose when he rejected S.B. after she became aware he had started a relationship with another woman.[2]

---

[2] During cross-examination, appellant asked S.B. whether he had told her when they were living together that he had a learning disability. S.B. replied he had never complained of a learning disability that prevented him from working. The only thing she was aware of was that he had moved from group home to group home. When the prosecutor cross-examined appellant, the prosecutor inquired about his memory loss as he

2. *The procedural facts.*

On November 12, 2010, appellant was arraigned on the criminal complaint, and the magistrate appointed counsel to represent appellant, Los Angeles County Deputy Public Defender Haaris A. Syed. The preliminary hearing was held on April 6, 2011. Appellant was held to answer and later arraigned on the information. On May 24, 2011, at a pretrial hearing, appellant was represented by another deputy public defender, Mr. Murrey Correa. Mr. Syed had required surgery and was unavailable. On May 24, 2011, appellant requested self-representation, which was granted after he entered into a *Faretta* waiver. On June 23, 2011, the petit jury was sworn. During trial, appellant represented himself. On July 1, 2011, the jury returned its guilty verdicts.

On July 1, 2011, after the verdicts were returned, appellant immediately requested the appointment of counsel. The trial court reappointed Mr. Syed. The matter was continued from time to time for a year and a half for sentencing until January 23, 2013, when the trial court heard appellant's motion for new trial.

---

had mentioned it in examining S.B. Appellant explained he had a "learning disability." He did not have to write things down so he could remember things that happened long ago. His memory was good. The disability had to do with "the words." He had to write them down and review them every couple of days so he would not forget them. Then he said he did not forget things that had happened; he forgot learning, "like, words, and stuff like that." He repeated he had a good memory. His short-term memory loss was the same thing as his long-term memory loss. Appellant claimed that the teaching he was getting on parole was to assist him to retain information. The psychological counseling was "because my mom died, and I kept seeing, like, certain images that remind me of my mom."

Later in his testimony, he said everything he reads he forgets. He explained that he remembered a word's definition and what it meant – that was how he communicated. He could not remember how to spell and forgets things, "like, the words." He said that he was seeing a "psych" because his mom died when he was age 15. Sometimes he thinks he sees her. When he was a child, he wanted to be with her and had only seen her seven times in his life. His criminal history was all related to running from various group homes to find his mother. When he ran, he stole food so he had something to eat. The thefts would lead to an arrest. He was a person without family and support. He said that he was in this predicament, referring to the instant charges, because he is a thief and he breaks his promises to women. That was the only thing of which he was guilty.

On January 23, 2013, the trial court read and considered the motion for new trial. Relying on appellant's prison records and appellant's performance during the trial, trial counsel argued that appellant was learning disabled. Trial counsel asserted appellant suffered short-term memory loss and some long-term memory loss resulting from a childhood head injury and that appellant was functionally illiterate. Trial counsel bolstered this claim with evaluations made at the time of appellant's 2008 prison incarceration. The prison records also disclosed appellant took medication to prevent seizures, and in 2008, he was diagnosed by prison personnel as suffering from schizophrenia. Trial counsel revealed appellant claimed he was hearing voices directing him to go in pro. per. during the trial proceedings. Appellant also had told trial counsel he had concluded Mr. Syed's absence during hospitalization was a sign from God indicating he should represent himself.

The motion for new trial referred to incidents during the actual trial that evidenced appellant had difficulties arising from his mental state with self-representation. In the motion for new trial, trial counsel asserted the trial court should have declared a doubt and proceeded pursuant to section 1367 as appellant was incompetent for purposes of self-representation, i.e., appellant was an *Edwards-Johnson* gray-area defendant. As such, the motion for new trial asserted appellant should be retried as the trial court had denied appellant "his federal and state rights to due process" when the trial court permitted him to proceed to trial without counsel.

Trial counsel also argued appellant was suffering memory losses during jury voir dire and these memory losses had interfered with his ability to impeach the witnesses at trial with their prior inconsistent statements.

At the hearing on the motion for new trial, the trial court and the prosecutor commented that appellant had conducted himself during the pretrial and trial proceedings in the same fashion as a typical pro. per. Appellant had fully participated in his trial and was aware of certain procedural rules indicating he had a minimal understanding of self-representation. Also, appellant had demonstrated during the trial no severe disabilities or bizarre thinking that would alert the trial court to any lack of competence. The trial court

detailed the events of appellant's *Faretta* waiver. It denied appellant's motion for a new trial on *Edwards-Johnson* grounds.

On January 29, 2013, the trial court sentenced appellant to state prison.

On June 19, 2008, the United States Supreme Court filed its decision in *Edwards*. On December 24, 2009, the California Supreme Court filed its decision in *People v. Taylor* (2009) 47 Cal.4th 850 (*Taylor*), a related case, following *Edwards*. *Taylor* was final on February 18, 2010. On January 30, 2012, the California Supreme Court filed its decision in *Johnson, supra,* 53 Cal.4th 519. The *Johnson* decision was final on April 11, 2012.

3. Indiana v. Edwards.

a. *The state of the law before the decision in* Edwards.

In California, prior to the decision in *Faretta, supra*, 422 U.S. 806, self-representation was discretionary with the trial court. (*Taylor, supra*, 47 Cal.4th at p. 871 & fn. 8; see also *Johnson, supra*, 53 Cal.4th at pp. 526-527.) " 'California law provide[d] *no* statutory or constitutional right of self-representation.' " (*Johnson, supra*, at pp. 525-526, 528.)

In *Faretta, supra*, 422 U.S. 806, the United States Supreme Court held that the Sixth Amendment to the United States Constitution gives criminal defendants the right to represent themselves. The decision explained a defendant's waiver of counsel must be undertaken voluntarily and " 'with eyes open' " to the disadvantages of self-representation. (*Id.* at p. 835.) Further, a defendant's "technical legal knowledge" was irrelevant to the exercise of the right to self-representation. (*Id*. at p. 836).

After *Faretta*, in *Godinez v. Moran* (1993) 509 U.S. 389, 396 (*Godinez*), the United States Supreme Court suggested that the federal constitutional standard for competency to stand trial and for a waiver of counsel is the same – that stated in *Dusky*: "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and . . . a rational as well as factual understanding of the proceedings against him.' " (*Dusky v. United States* (1960) 362 U.S. 402 (per curiam).) "The due process clause of the federal Constitution's

Fourteenth Amendment prohibits trying a criminal defendant who is mentally incompetent. (*Medina v. California* (1992) 505 U.S. 437, 439 . . . ; *Pate v. Robinson* (1966) 383 U.S. 375, 378.)" (*People v. Ary* (2011) 51 Cal.4th 510, 517 (*Ary*).)

"When a trial court is presented with evidence that raises a reasonable doubt about a defendant's mental competence to stand trial, federal due process principles require that trial proceedings be suspended and a hearing be held to determine the defendant's competence. [Citations.] Only upon a determination that the defendant is mentally competent may the matter proceed to trial. [Citation.]." (*Ary, supra*, 51 Cal.4th at p. 517.)

California statutes reflect these constitutional requirements. "Section 1368, in subdivision (a), requires a trial court to suspend criminal proceedings at any time 'prior to judgment' if the court reasonably doubts 'the mental competence of the defendant.' A defendant can create reasonable doubt through substantial evidence of mental incompetence, or the trial court can raise the issue on its own. [Citations.] Section 1369 provides for the appointment of psychiatrists as well as licensed psychologists to assess the defendant's mental competence (*id.*, subd. (a)); and it allows both the defense and the prosecution to present evidence to either support or counter a claim of the defendant's mental incompetence to stand trial (*id.*, subds. (b)-(d))." (*Ary, supra*, 51 Cal.4th at pp. 517-518.) A defendant is presumed competent and bears the burden of proving by a preponderance of the evidence a lack of competence. (§ 1369, subd. (f); (*Ary*, at p. 518.)

"Substantial evidence of mental incompetence is evidence that raises a reasonable doubt on the issue. (*People v. Alvarez* (1996) 14 Cal. 4th 155, 211.) In determining whether there is substantial evidence of incompetence, a court must consider all of the relevant circumstances, including counsel's opinion. (*People v. Howard* (1992) 1 Cal. 4th 1132, 1164.) '[T]he "inexactness and uncertainty" that characterize competency proceedings may make it difficult to determine whether a defendant is incompetent or malingering.' (*Cooper v. Oklahoma* [(1996)] 517 U.S. [348,] 365.) Thus, 'what constitutes . . . substantial evidence in a proceeding under section 1368 "cannot be

answered by a simple formula applicable to all situations." [Citation.]' (*People v. Laudermilk* (1967) 67 Cal. 2d 272, 283.) ' "[S]ufficient present ability" ' to cooperate with a lawyer and assist rationally in preparing a defense includes more than an 'orientation as to time and place,' and 'some recollection of events is not enough.' (*People v. Tomas* (1977) 74 Cal.App.3d 75, 88.) Mere bizarre statements or actions are generally insufficient to constitute substantial evidence raising a doubt as to the defendant's competency. (*People v. Burney* (1981) 115 Cal.App.3d 497, 503.) On the other hand, the testimony of one mental health professional that the defendant is unable to assist in his or her defense because of a mental defect constitutes substantial evidence sufficient to compel a hearing. (*People v. Stankewitz* (1982) 32 Cal. 3d 80, 92.)" (*People v. Castro* (2000) 78 Cal.App.4th 1402, 1415-1416 (*Castro*), overruled on other grounds in *People v. Leonard* (2007) 40 Cal.4th 1370, 1391 & fn. 3.)

"It is not essential for the defendant, his or her counsel, or the prosecutor to make a motion which raises the issue of the defendant's competence in order to permit consideration of the issue on appeal. (*People v. Tomas, supra*, 74 Cal.App.3d at p. 88; see also *People v. Aparicio* (1952) 38 Cal. 2d 565, 568-569.) Rather, the presence of the requisite substantial objective evidence compels the trial court to sua sponte suspend proceedings and order a hearing, and the court's failure to do so in the face of such evidence is an act in excess of its jurisdiction and may be raised by the defendant on appeal from the judgment. ([*People v. Superior Court* (*Marks*) (1991)] 1 Cal.4th [56,] 69; *People v. Tomas, supra*, 74 Cal.App.3d at p. 90.) The trial court's duty includes sua sponte reconsideration of pro se status where there is substantial evidence bringing the defendant's competency into doubt. [Citation.]" (*Castro, supra*, 78 Cal.App.4th at p. 1416.)

b. *The United States Supreme Court's decision in* Edwards.

In *Edwards*, *supra*, 554 U.S. 164, the United States Supreme Court refined the federal standard for determining when a defendant may proceed with self-representation. It added a gloss onto the decisions in *Faretta* and *Godinez*. It held "the [federal] Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Id.* at pp. 177-178.) *Edwards* designated defendants who are trial competent, but not competent under that decision for purposes of self-representation, "gray-area defendants." (*Id*. at p. 174.)

The court in *Edwards* explained that as a matter of preserving the right and the appearance of the right of a fair trial, it was permitting state courts to deny self-representation to *Dusky*-competent defendants who are so mentally disabled they are otherwise unable to carry out the basic tasks needed to present a defense without the assistance of counsel. (*Edwards*, *supra*, 554 U.S. at pp. 176-178.)[3]

Following the decision in *Edwards*, in *Taylor, supra,* 47 Cal.4th 850, the California Supreme Court addressed whether a trial court should have denied or revoked self-representation during Taylor's trial proceedings on the ground he was an *Edwards* gray-area defendant, i.e., Taylor asserted that he was not competent to represent himself under the heightened standard in *Edwards*. (*Taylor*, *supra*, 47 Cal.4th at p. 882.) After setting out a complete history of such issues under federal and state law, the *Taylor* court held there was no error. The court reasoned when Taylor was tried, the state law in California had not changed following the decision in *Edwards*. California had not

---

[3] The *Edwards* court drew a distinction between the competency to waive counsel or proceed in pro. per. during a plea of guilty, such as in *Godinez, supra,* 509 U.S. at pages 399 to 400, and the competence to proceed with self-representation during a trial. (*Edwards, supra*, 554 U.S. at p. 173.)

adopted the standard in *Edwards*, and California law provided the trial court with no test of mental competence to apply other than the *Dusky* standard of competence to stand trial. Under the *Dusky* standard, Taylor was competent, and the trial court properly refused to find that he was a gray-area defendant and to deny or to revoke self-representation.

Subsequently, the California Supreme Court decided *Johnson, supra,* 53 Cal.4th 519. In *Johnson*, on appeal, the defendant challenged whether the trial court properly revoked his self-representation status when the trial court, expressly relying on *Edwards*, had concluded defendant was too mentally disorganized to represent himself. (*Johnson, supra*, at p. 525.) The Supreme Court concluded there was no error as the trial court determined, as a matter of first impression, that appellant was a gray-area defendant pursuant to *Edwards*. (*Id*. at pp. 528, 530.)[4] The Supreme Court approved the trial court's exercise of discretion and adopted the heightened standard in *Edwards* as a new rule of criminal procedure under California law. It held a California trial court may deny or revoke self-representation where "the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel." (*Id*. at p. 530.)

However, in establishing this new rule, it pointed out that due process does not mandate this higher standard for denying or revoking self-representation; *Edwards* held only that states may impose a higher standard without running afoul of the federal Constitution and *Faretta*. Thus, refusing to grant self-representation or revoking self-

---

[4] After a section 1368 jury trial in *Johnson* in which the jury found appellant to be competent, the trial court found appellant qualified as a gray-area defendant. To support its ruling, the trial court catalogued appellant's bizarre, noncompliant and disruptive behavior in the court and in the jail. The trial court said that even if appellant is competent to be represented by counsel, appellant " 'has disorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety' " and other common symptoms of severe mental illness that impair his ability to play the significantly expanded role required for self-representation. (*Johnson, supra*, 53 Cal.4th at p. 525.)

representation for a gray-area defendant is discretionary with the trial court. The new California standard is not constitutionally compelled. (*Johnson*, *supra*, 53 Cal.4th at pp. 528, 530, 531-532.)

Furthermore, the *Johnson* court cautioned that trial courts are not required routinely to inquire into mental competence at the time of a *Faretta* waiver; inquiry is only necessary when the trial court has doubts concerning a *Faretta* defendant's capacity. (*Johnson*, *supra*, 53 Cal.4th at p. 530-531.) The *Johnson* court directed that when the trial court suspects it has before it a "gray-area defendant," the trial court should proceed to appoint appropriate experts employing the same statutory procedures used to determine trial competence pursuant to *Dusky*. (*Ibid*.; see §§ 1368, 1369 [procedure for declaring a doubt as to mental competency and the appointment of experts to opine on competence].)

DISCUSSION

It is appellant's assertion in this appeal that his *Faretta* waiver was uninformed, i.e., unintelligent and unknowing, and involuntary, and for that reason, he is entitled to a reversal.

1. *The standard of review for a knowing, intelligent and voluntary* Faretta *waiver.*

There is no required form of the waiver of counsel in favor of self-representation. "The requirements for a valid waiver of the right to counsel are (1) a determination that the accused is competent to waive the right, i.e., he or she has the mental capacity to understand the nature and object of the proceedings against him or her; and (2) a finding that the waiver is knowing and voluntary, i.e., the accused understands the significance and consequences of the decision and makes it without coercion. [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 139 (*Lawley*).) "No particular form of words, however, is required in admonishing a defendant who seeks to forgo the right to counsel and engage in self-representation. ' "The test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." ' [Citations.]" (*Id.* at p. 140.)

People v. Koontz (2002) 27 Cal.4th 1041, at pages 1070 to 1071, explained "[i]n *People v. Lopez* (1977) 71 Cal.App.3d 568 (*Lopez*), the court enumerated a set of suggested advisements and inquiries designed to ensure a clear record of a defendant's knowing and voluntary waiver of counsel. First, the court recommended the defendant be cautioned (a) that self-representation is 'almost always unwise,' and the defendant may conduct a defense ' "ultimately to his own detriment "' (*id*. at p. 572); (b) that the defendant will receive no special indulgence by the court and is required to follow all the technical rules of substantive law, criminal procedure and evidence in making motions and objections, presenting evidence and argument, and conducting voir dire; (c) that the prosecution will be represented by a trained professional who will give the defendant no quarter on account of his lack of skill and experience; and (d) that the defendant will receive no more library privileges than those available to any other self-represented defendant, or any additional time to prepare. Second, the *Lopez* court recommended that trial judges inquire into the defendant's education and familiarity with legal procedures, suggesting a psychiatric examination in questionable cases. The *Lopez* court further suggested probing the defendant's understanding of the alternative to self-representation, i.e., the right to counsel, including court-appointed counsel at no cost to the defendant, and exploring the nature of the proceedings, potential defenses and potential punishments. The *Lopez* court advised warning the defendant that, in the event of misbehavior or disruption, his or her self-representation may be terminated. Finally, the court noted, the defendant should be made aware that in spite of his or her best (or worst) efforts, the defendant cannot afterwards claim inadequacy of representation. (*Id*. at pp. 572-574.) As indicated above, the purpose of the suggested *Lopez* admonitions is to ensure a clear record of a knowing and voluntary waiver of counsel, not to create a threshold of competency to waive counsel. [Citations.]"

" 'On appeal, we independently examine the entire record to determine whether the defendant knowingly and intelligently waived the right to counsel.' [Citations.] [¶] The failure to give a particular set of advisements does not, of itself, show that a *Faretta* waiver was inadequate. Instead, '[t]he burden is on appellant to demonstrate that he did

not intelligently and knowingly waive his right to counsel. . . . [T]his burden is not satisfied by simply pointing out that certain advisements were not given.' [Citations.]" (*People v. Weber* (2013) 217 Cal.App.4th 1041, 1058-1059; see also *People v. Elliot* (2012) 53 Cal.4th 535, 591-592.)

2. *Appellant's* Faretta *waiver*

At May 24, 2011, appellant asserted he wanted to go in pro. per. He claimed that he did not "feel [he was] being represented right." The trial court commented, "And you know how to do it better," and appellant replied, "My mom used to be a lawyer." The trial court told him, "Well, you're in jail and your mother is not going to be helping you." Appellant said, "I understand that, sir. It seems like people are getting thrown away with cases like this. If I'm going to be thrown away, I might as well do it myself."

The trial court warned appellant that he would be up against a trained and experienced prosecutor, appellant had not tried a criminal case previously and he was not a law school graduate. Appellant agreed. The trial court asked appellant how he possibly would know what to do. Appellant replied, "I know I didn't do this and I know I could prove myself innocent." The trial court asked appellant whether he was familiar with the rules of evidence and criminal procedure on how to do that, and appellant said, "I have all day, all month in jail to learn that."

The trial court asked appellant how he was going to learn what a lawyer learned in three years of law school in the three weeks remaining until trial. Appellant acknowledged it would be difficult, but he claimed he could learn the basics. The trial court asked, "You think so? "And if you're convicted and you get a lengthy sentence, you're not going to be able to get the case overturned on appeal because you didn't know what you were doing or you were incompetent? How old are you?" Appellant replied, "Twenty-nine." The trial court told him, "This is the dumbest mistake you have made in 29 years."

The trial court inquired how many cases Mr. Correa, the deputy public defender in court with appellant, had tried, and Mr. Correa replied, "About 60, 70." The trial court asked appellant, "Why don't you let Mr. Correa, who is a lawyer who has tried cases, who does know what he's doing in a courtroom, why don't you let him represent you? You don't know what you're doing. You don't know how to defend yourself in this case." Appellant said, "I asked for a lot of things since I've been in jail with nothing has been done." The court inquired, "Who is telling you what to ask for?" Appellant replied, "Basic stuff." The trial court asked, "Like what?" Appellant said, "I'm asking can I get certain people investigated in the family who were actually living there and—"

The trial court interrupted and asked what investigating the family was going to do. Appellant replied, "[To] prove my innocence," and "Everything is on paper, sir, if you read. The girl says someone touched her. How could you put somebody in jail if she said someone touched her?" The trial court commented it did not want to get into the merits of the case. It advised appellant, "You would be doing a hugely foolish thing if you represent yourself."

Mr. Correa told the trial court appellant's former trial counsel, Mr. Syed, had had surgery and might be back the next day. Mr. Correa wanted to put the matter over to see whether Mr. Syed would be returning. However, Mr. Correa could not do so as appellant was refusing to "waive time."

The trial court explained to appellant that his case possibly involved a life term in prison. The trial court inquired whether appellant wanted self-representation when he could be spending the rest of his life in prison. Appellant said, "I go out fighting than taking any time for free?" The trial court said it did not understand what appellant meant. Appellant explained that Mr. Correa was asking him to enter into a plea bargain for a six-year prison term. The trial court told appellant he was not obligated to accept any plea offer. Mr. Correa indicated the plea offer had been withdrawn.

The trial court again told appellant to let Mr. Correa, who knew what he was doing, try the case. It repeated appellant did not know what he was doing.

The trial court inquired how much schooling appellant had. Appellant claimed that he had graduated from college. The trial court told him, "But you haven't been to law school," and advised appellant he could not "possibly learn proper procedure in [the] three weeks" before the trial started. It said, "If you really want to represent yourself, you can do it." The trial court advised appellant how foolish he was to proceed in pro. per. Appellant responded, "So I just supposed to go to trial and just hope the person is fighting for me?" The trial court told appellant Mr. Correa would fight for him; it was counsel's ethical obligation as an attorney to do so.

When asked what he wanted to do, appellant replied he wanted self-representation.

The trial court had his court personnel hand appellant the Los Angeles County Superior Court's pre-printed form for waiving counsel in favor of self-representation. The trial court indicated it would inquire later.

Appellant filled in the form, initialing the boxes following the seven constitutional rights listed in its initial section. The form explained that by initialing the boxes, appellant was indicating he could read and write and he understood the constitutional rights and the further explanation of those rights: the right to an attorney, the right to a speedy trial and a jury trial, the right to subpoena witnesses and records, the right to confront and cross-examine witnesses, the right against self-incrimination, the right to be released on bail, and the right to self-representation.

In the form, by way of background, appellant claimed that he graduated from Carson High School and had no further education or employment experience. The form detailed the dangers and disadvantages of self-representation, including that he would not obtain the assistance of a lawyer or the court during his trial proceedings and he would be expected to follow all the technical rules of substantive law, criminal procedure and evidence. Further advisements included that appellant would be facing an experienced prosecutor and would not get assistance from the trial court during the trial. Appellant would be expected to conduct all the pre- and post-trial and trial proceedings just as a lawyer would, without the assistance of an attorney, including proposing jury instructions, examining witnesses and making appropriate objections and motions during

the trial. If appellant were to engage in misconduct, or if he changed his mind midtrial, his request for counsel might well be denied. The form informed appellant that movement in the courtroom would be limited, any attorney appointed later during the proceedings may well be at a disadvantage in representing him, and by obtaining self-representation, he was giving up his right to raise on appeal ineffective assistance of trial counsel.

On the form, appellant indicated he was aware of the nature of the crime, he knew the facts to be proved in order to find him guilty and he was familiar with the defenses to the crime. He acknowledged the trial court did not recommend self-representation, he had read and listened to the trial court's advice and warnings on the matter, and he wished to proceed in pro. per. and waive his constitutional right to counsel by making his request. After filling out the form and initialing its pertinent boxes, appellant signed and dated the form, thereby acknowledging he freely and voluntarily gave up his constitutional right to counsel in favor of self-representation.

After appellant filled in the waiver form, the trial court inquired on the record whether appellant understood each advisement. Appellant said he had signed the form and thereby understood he had a right to counsel. He said by signing the form he was indicating he wished to waive his right to counsel in favor of self-representation. Appellant agreed he was "fully aware that there are extreme dangers and disadvantages . . . [in] representing [himself]," and nevertheless, he still wished self-representation.

Appellant immediately requested the preliminary hearing transcript and in pro. per. funds. The trial court had the prosecutor prepare a discovery packet to give appellant. Later that afternoon, the prosecutor turned over the discovery packet to appellant.

During that appearance, the prosecutor also advised the trial court that appellant's parole officer stated for purposes of the pre-plea probation report that appellant was on parole. In the probation report, the parole officer disclosed that appellant has been

diagnosed with long term and short term memory loss. The trial court told the prosecutor, "That's not a basis for" denying or revoking "pro per status."[5]

3. *Analysis.*

Appellant makes a narrow contention. He attacks only the validity of his *Faretta* waiver and asks this court to institute a new rule of criminal procedure, which applied to his case, requires a reversal of the judgment.[6]

Appellant asserts the state and federal constitutions "now mandate that the standard advisements and waivers for defendants seeking pro. per. status must include a formal inquiry as to their present mental ability to do so." He urges that gray-area

---

[5] Appellant makes a claim in his motion for new trial that he asked for standby counsel on June 16, 2011. However, our appellate record fails to contain a minute order reflecting that request, and the record contains no reporter's transcript for that date. We note that references to the record of the actual trial are made in the motion for new trial. We were unable to tie those references to our appellate record as the pagination in the transcript from which trial counsel was working in the trial court differs from that provided on appeal. (See Cal. Rules of Court, rule 8.204 (a)(1)(C); *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282 [it is incumbent upon appellant to support his claims with references to the evidence in the trial record. The reviewing court is not called upon to make an independent search of the record where this rule is ignored.].)

[6] In this appeal, appellant does not raise a threshold challenge that at the time of the motion for new trial, substantial evidence disclosed appellant was an *Edwards-Johnson* gray-area defendant. Nor does he address another threshold issue of whether a developmental disability, as contrasted with a "severe mental illness," triggers the heightened *Edwards* standard adopted by the court in *Johnson*. (See *Johnson, supra,* 53 Cal.4th at p. 530.) Additionally, appellant has failed to brief the issue of the retroactive or prospective operation of the decision in *Johnson*. (See *People v. Carrera* (1989) 49 Cal.3d 291, 327-328; *People v. Guerra* (1984) 37 Cal.3d 385, 399-417 [extensive discussion of test for retroactivity in the context of the applying the new rule in *People v. Shirley* (1982) 31 Cal.3d 18, 66-67, concerning the admissibility of testimony following hypnosis]; *Donaldson v. Superior Court* (1983) 35 Cal.3d 24, 36-38 [new rule of search and seizure given prospective effect]; *People v. Rollins* (1967) 65 Cal.2d 681, 685-686 & fn. 3 [the decision in *Miranda v. Arizona* (1966) 384 U.S. 436 does not apply to trials which commenced before those decisions were announced even though such cases may be on direct appeal; the *Rollins* decision also notes judicial decisions presumptively apply to all cases pending on direct review when the decision is rendered].)

defendants are entitled to "be made aware of the potential impact of their condition" so as " to be able to intelligently decide whether to relinquish counsel." He urges the standardized advisements and waivers here failed to alert either appellant or the trial court as to the potential effect appellant's psychiatric condition might have on his ability to adequately represent himself. The lack of adequate advisements also left the trial court in the position of having inadequate information to take a valid waiver. And, there was no location on the *Faretta* waiver form for appellant to indicate whether he presently suffered from, or was being treated for, or had a history of mental impairment. Thus, the trial court was left unaware of appellant's history. The trial court did not inquire of appellant as to whether he had a history of psychiatric treatment, including institutional commitment, which would have addressed the problem posed by persons such as appellant who deny present incompetency but suffer from chronic disabilities.

The contention lacks merit.

a. *Validity of the* Faretta *waiver.*

Appellant's waiver of counsel was valid. As the trial court and prosecutor observed at the time the trial court ruled on appellant's motion for new trial on *Johnson-Edwards* grounds, nothing that occurred during the proceedings disclosed appellant's developmental or emotional condition interfered with his self-representation. When the trial court granted appellant self-representation, it had appellant read and fill out a standardized *Faretta* waiver form. Therein, appellant acknowledged he understood the dangers and pitfalls of self-representation and still wanted to represent himself. He said he understood the constitutional rights he had during the trial proceedings and claimed he understood them. He indicated he had a high school education and failed to disclose his claimed learning disability, a disability he later claimed interfered with self-representation. The written *Faretta* waiver form provided to him generally conformed to the suggested advisements and inquiries in *Koontz* and *Lopez*.

Orally, on the record, appellant was told repeatedly by the trial court he was being foolish by requesting self-representation when he lacked legal training. Appellant indicated he would be satisfied proceeding with what little criminal procedure he might

learn in the next three weeks before trial. The trial court spoke to appellant at some length, repeating the warnings concerning the pitfalls of self-representation contained in the form. The trial court pointed out to appellant he had trial counsel available to him who was experienced and a match for the trained and experienced prosecutor. When appellant complained about being persuaded to accept a plea bargain and he feared trial counsel would not advocate for him, the trial court explained to appellant that appellant had no obligation to accept any plea offer and trial counsel was ethically bound to enthusiastically represent appellant. In its advice, the trial court asked appellant questions requiring responses sufficient for the trial court to have an adequate opportunity to evaluate appellant's fitness for self-representation.

In the later ruling on the motion for a new trial, considered a year and a half after trial, the trial court observed that during the *Faretta* waiver and trial proceedings, it observed no evidence appellant was too mentally ill to represent himself. It commented appellant had personally filled out the entire waiver of counsel form, and his writing was neat. In the form, appellant indicated he was aware of the charges and whether the offenses were general or specific intent crimes. Appellant said he was aware of the elements of the offenses and the defenses. The trial court asserted it had diligently attempted to persuade appellant to accept representation by counsel, but appellant was adamant. Nothing the trial court observed during the waiver had alerted the trial court that appellant had long-and short-term memory loss. The comments by the prosecutor that appellant had short-term and long-term memory loss were insufficient to make the trial court aware appellant had any kind of disability disqualifying him from self-representation.

The trial court observed that appellant had fully participated in the trial. Appellant raised a rational defense. At trial, he claimed he did not commit the acts for which he was charged. He speculated in his testimony the charges arose from the jealousy of his former girlfriend, who was unhappy with him when he acquired a new girlfriend. He conducted a rational voir dire of the potential jurors, asking them questions designed to ferret out whether they would be sympathetic to his defense and to him at trial and related

to the defense he intended to raise. He cross-examined witnesses, engaged in oral argument and raised objections during the trial. Pretrial, he requested discovery and asked for in pro. per. funding. Post-trial, he immediately asked the trial court when he was to file a petition for habeas corpus, perhaps mistaking a habeas petition for the appeal. When the trial court indicated any petition for a writ of habeas corpus was filed only after sentencing, appellant immediately asked for representation by counsel for the sentencing proceedings, and the trial court reappointed Mr. Syed, who represented him for the next year and a half until he was sentenced.

There was no evidence presented to the trial court in the motion for new trial indicating appellant was one of those rare persons who might be a gray-area incompetent. A history of mental illness, even present mental illness, and self-serving claims of hearing voices and believing God is giving you a sign do not amount to substantial evidence of gray-area incompetence. If appellant were being medicated before or during the trial, the medication was never specified; it might not have related to his schizophrenia, but to the seizures he suffered. Appellant's trial performance indicated that in so far as appellant may have suffered learning disabilities, it was not apparent during the trial. And given appellant's performance at the trial, the trial court did not abuse its discretion by concluding appellant was overstating or feigning disability, or that such disabilities had not interfered significantly with his performing the basic tasks of trial. (Compare these cases concerning *Dusky* competence: *People v. Laudermilk, supra*, 67 Cal.2d at p. 285 [mere bizarre actions or bizarre statements or statements of defense counsel that defendant is incapable of cooperating in his defense or psychiatric testimony that a defendant is immature, dangerous, psychopathic or homicidal or such diagnosis with little reference to defendant's ability to assist in his own defense does not constitute substantial evidence triggering a trial court's duty to declare a doubt and send a defendant for a section 1368 examination for competency]; see also *People v. Ramirez* (2006) 39 Cal.4th 398, 431 [the same]; *People v. Blair* (2005) 36 Cal.4th 686, 714 [a history of mental illness and taking psychotropic medication does not constitute substantial evidence of incompetence]; *People v. Hayes* (1999) 21 Cal.4th 1211, 1281 [evidence

regarding past events that does no more than form the basis for speculation regarding possible current incompetence is insufficient to require the trial court to declare a doubt].)

Based on this record, appellant's *Faretta* waiver was knowing, intelligent and voluntary, and he was not denied his federal constitutional right to counsel. Nor is there any indication in this record that his trial was fundamentally unfair.

b. *The request to this court to institute a new rule of criminal procedure.*

Insofar as appellant is claiming the *Faretta* waiver is invalid as the inquiry of appellant and the trial court's advice of the dangers and pitfalls of self-representation were deficient after the decisions in *Edwards and Johnson*, we disagree.

This court declines to institute a bright-line rule of criminal procedure requiring *Edwards-Johnson* inquiries in every case. To impose specific inquiries or advice for a valid waiver conflicts with the well established rule that "no particular form of words" is necessary to obtain a valid *Faretta* waiver. (*Lawley, supra*, 27 Cal.4th at p. 140.) To do so would be at odds with the well-established rule of review that "[w]hat is critical is whether a review of the entire record discloses a knowing and voluntary waiver. (*Ibid*.) The test of a valid waiver is not whether the specific warnings and advisements were given, but whether the record as a whole demonstrates the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. Furthermore, the suggested *Lopez* admonitions are for the purpose of ensuring a clear record of a knowing and voluntary waiver of counsel, not to create a threshold of competency for the waiver of counsel. (*Koontz, supra*, 27 Cal.4th at p. 1071.

Moreover, appellant's claim defendants have a "fundamental right to be made aware of the potential impact of their condition" so as "to be able to take this into account when deciding whether to relinquish" counsel is not supported by the case law.
In *Johnson*, the court pointed out the improper denial of in pro. per. privileges for a gray-area defendant does not amount to a denial of due process. (*Johnson*, *supra*, 53 Cal.4th at p. 527.) In any event, it is unlikely that mentally-ill defendants bent on self-representation will spontaneously, or in response to trial court inquiries, disclose their mental health history or present their individual mental difficulties to trial court.

(See *United States v. Hill* (7th Cir. 2001) 252 F.3d 919, 928.) More likely, where a defendant is not suspected prior to trial of being *Dusky* incompetent, it is a defendant's pretrial and trial performance that will disclose gray-area incompetence.

Contrary to appellant's claims, nothing in the *Edwards* or *Johnson* decisions supports his claim that new and specific *Faretta* inquiries or advice are required to implement the principles set out in those decisions. Nor do the decisions suggest defendants should be routinely asked or advised about their potential mental disabilities during the *Faretta* waiver. Rather, the *Johnson* court warns trial courts that it contemplates the new heightened standard for denial or revocation of self-representation will be sparingly applied so as not to jeopardize defendants' rights to self-representation. More importantly, it advises trial courts they "need not routinely inquire into mental competence of a defendant seeking self-representation. It needs to do so only if it is considering denying self-representation due to doubts about the defendant's mental confidence." (*Johnson, supra,* 53 Cal.4th at p. 530.) And, *Johnson* indicates the new heightened standard for competency is intended to be used only in those few instances where doubts arise during the proceedings that a defendant suffers a mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel. (*Ibid*.)[7]

---

[7] Nevertheless, prospectively, after *Johnson*, trial courts may wish to advise defendants one pitfall of self-representation is that in pro. per. privileges may be revoked during trial if it becomes apparent to the trial court the defendant has a mental illness that prevents him from performing the basic tasks of self-representation. But, as in *Lopez*, we conclude no one specific advisement is required in every case. The validity of a waiver of counsel is determined by examining the whole record.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.